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No. 82-

82-163

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

CITY OF CHEROKEE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

In this case the Interstate Commerce Commission declined to suspend or to investigate a rate proposed by a railroad pursuant to a statutory provision enacted in the Staggers Rail Act of 1980 to permit railroads to impose surcharges on traffic moving to and from their light density lines to insure that the railroad can earn up to a specified level of its costs of providing service to and from such lines. The court of appeals enjoined the Commission from allowing the rate to go into effect and held, *inter alia,* that despite the general rule that Commission decisions not to suspend a rate are generally not reviewable (see, *Southern Ry.* v. *Seaboard Allied Milling Corp.,* 442 U.S. 444 (1979)), it has jurisdiction over *this* Commission action because of its authority under the All Writs Act, 28 U.S.C. 1651(a), to protect its jurisdiction over an abandonment proceeding then before the Commission following remand from the court of appeals. The court of appeals also ordered the Commission to conduct a hearing to determine the "appropriateness" of the proposed rate consistent with its opinion.[1]

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[1]Respondents are City of Cherokee, Iowa, Farmers Co-op, Archer Co-op, Calumet Feed Service, Metz Baking Company, Ray Holder Agg Lime Service, Rowena Elevator & Mill, C. S. Agro Corp., Farmer's Co-op of George, Iowa, Boyden Agg Lime, and M. S. Stuckey.

The questions presented are:

1. Whether the court of appeals properly invoked jurisdiction to review the Commission's decision not to suspend and not to investigate a carrier-initiated rate proposal despite the general rule against reviewability of such Commission decisions;

2. Whether the court of appeals may properly order the Commission to conduct, in effect, an investigation to determine the lawfulness of a proposed rate where the Commission itself declined to do so.

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OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-11a) is reported at 671 F.2d 1080. The notice of action by Division 1 of the Interstate Commerce Commission (App. D, *infra*, 13a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 10a-11a) was entered on February 17, 1982. The Commission's timely petition for rehearing was denied on March 31, 1982 (App. C, *infra*, 12a) On June 21, 1982, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to July 30, 1982. The Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES INVOLVED

Pertinent provisions of 49 U.S.C. (Supp. IV) 10705a(b) and 28 U.S.C. 1651 are set forth at App. E, *infra*, 14a-17a.

STATEMENT

1. The Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (October 14, 1980) added new Section 10705a to the Interstate Commerce Act (the Act). This provision substantially modified the Act with respect to joint rates and revenue divisions. In particular, new Section 10705a(b) authorizes rail carriers to file and collect surcharges for transportation services they perform on "light density rail lines."[2] They may do so "without the concurrence of any rail carrier," 49 U.S.C. (Supp. IV) 10705a(b)(1), thus allowing carriers unilaterally to increase their divisions on joint rate/through routes—a practice formerly proscribed by the Act.

If a carrier is "not earning adequate revenues", as determined under Section 10704(a)(2),[3] the carrier may file and collect a surcharge on its light density rail line if it currently earns less than a specified level of revenue for shipments it transports to and from the line. 49 U.S.C. (Supp. IV) 10705a(b)(1)(A). The statute identifies the specified level of revenue as revenue equal to 110 per-

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[2]"Light density rail line" is a shorthand reference to a line that "carried less than 3 million gross ton miles of traffic per mile in the most recent calendar year for which traffic data is available." 49 U.S.C. (Supp. IV) 10705a(b)(1)(A). Petitioners below did not contest that the line at issue in this case is a light density rail line.

[3]The Commission has in fact determined that the involved rail carrier—Illinois Central Gulf Railroad Company—is not earning "adequate revenues" pursuant to Section 10704(a)(2). *Standards For Railroad Revenue Adequacy*, 364 I.C.C. 803 (1981), *petition for review pending sub. nom. Bessemer and Lake Erie Railroad Co.* v. *I.C.C.*, No. 81-1492 (3rd Cir.)

cent of the variable cost of transporting the traffic to or from the line *plus* 100 percent of the carrier's "reasonably expected costs" of continuing to operate the line.[4] 49 U.S.C. (Supp. IV) 10705a(b)(2). There are no other statutory conditions concerning a rail carrier's authority to make surcharges other than the specified jurisdictional limit.

Shippers may ask the Commission to suspend the application of a surcharge so that it does not take effect on the proposed date. 49 U.S.C. (Supp. IV)10705a(b)(6). However, the Commission may—but is not required to—suspend a proposed surcharge only if the protesting shipper "demonstrates to the Commission that, after application of the surcharge, the surcharging carrier's revenues exceed 110 percent of such carrier's variable cost of transporting all traffic to or from such line plus such carrier's reasonably expected costs of continuing to operate such line."[5] Section 10705a(b)(6) also provides that if such demonstration is made by a protesting ship-

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[4]The statute at 49 U.S.C. (Supp. IV) 10705a(b)(2) directs the Commission to complete a proceeding to define the term "reasonably expected costs" within 120 days after the effective date of the Staggers Act. Upon passage of the Staggers Act (effective October 1, 1980), the Commission started to develop the required standards. The Commission issued its proposed rules in Ex Parte 402, *Reasonably Expected Costs*, 46 *Fed. Reg.* 9670 (January 29, 1981). On July 15, 1982 the Commission approved final rules; *Federal Register* publication is presently scheduled for August 4, 1982. Prior to promulgation of the final rules, the Commission has used as its interim rules the previously established Rail Services Planning Office (RSPO) subsidy standards, set forth at 49 C.F.R. 1121.40 *et. seq.* Indeed, the Staggers Act requires that the RSPO subsidy standards be used as interim rules. 49 U.S.C. (Supp. IV) 10705a(b)(2).

[5]This demonstration must be made "in addition to the matters required by [Section 10707(c)]." 49 U.S.C. (Supp. IV) 10705a(b)(6). Section 10707(c) states that the Commission may not suspend a proposed rate unless the protestant shows that—

per, "the Commission may suspend the application of *only so much of the surcharge* as will produce revenues in excess of the amount so demonstrated" (emphasis added).

If the Commission chooses not to suspend, shippers have two means under the statute by which to challenge the surcharge. First, upon petition of a shipper on the affected line, the Commission may cancel the surcharge if the shipper shows that, after application of the surcharge, the carrier's revenue exceeds the specified revenue level. 49 U.S.C. (Supp. IV) 10705a(b)(3)(A).

Second, shippers (or any person) may file a complaint with the Commission pursuant to 49 U.S.C. (Supp. IV) 11701(b), alleging that the surcharge violates either Section 10705a(b) or any other provision of the Interstate Commerce Act. The Commission would hold a hearing on the complaint, and if it determined that the surcharge was unlawful, would award damages where appropriate.[6] The Commission's decision on the complaint is subject to judicial review.

2. In April 1981, the Illinois Central Gulf Railroad (ICG) published a proposed surcharge, pursuant to Section 10705a(b), of $1,004.00 per car on shipments to or from its Sioux Falls District line.

(A) it is substantially likely that the protestant will prevail on the merits;

(B) without suspension, the proposed rate change will cause substantial injury to the protestant or the party represented by the protestant; and

(C) because of the peculiar economic circumstances of the protestant, the provisions of subsection (d) of this section [requiring carrier to account for amounts received under the increase during investigation] do not protect the protestants.

[6]Significantly, however, Section 10705a(g)(3) limits remedies when application of a light density lines surcharge is found to violate any provision of the Act.

Petitioners below protested the surcharge and requested the Commission to reject the surcharge or, if it did not reject it, to suspend the rate pending investigation. Petitioners below did not attempt to make the showing required under Section 10705a(b)(6) before the Commission may suspend a surcharge. They alleged instead, *inter alia*, that the surcharge constituted a *de facto* abandonment of the rail line and violated the court of appeals' mandate remanding the Commission's earlier decision authorizing ICG to abandon the same line. 49 U.S.C. (Supp. IV) 10903 *et seq.*[7]

3. The Commission's Suspension Board declined to suspend or to investigate the surcharge. The Commis-

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Section 10705a(g)(3) (emphasis added):

> (3) Except as provided in subsection (i), (j), or (k) [dealing with complaints by Class III carriers] of this section, *if the application of a surcharge or the cancellation of the application of a joint rate under this section is found to constitute a violation of any provision of this title,* such violation shall not be ordered remedied in any manner which—
>
> (B) which requires the carrier applying a surcharge under subsection (b) of this section to provide service over the route to which such surcharge applies in a manner that provides revenues to such carrier that are less than 110 percent of such carrier's variable cost of transporting the traffic involved to or from the line to which the surcharge applies, plus such carrier's reasonably expected costs of providing service over such line.

[7]In *City of Cherokee* v. *I.C.C.*, 641 F. 2d 1220 (8th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3278, the court of appeals remanded the Commission's decision authorizing abandonment on two grounds: (1) the Commission had improperly found labor expenses to be "avoidable costs" following abandonment; and (2) the Commission had not properly weighed the competing burdens/benefits of both the carrier and the affected communities. The reopened hearings have been completed and final Commission action is now pending.

sion's Division 1 (a 3-member panel of the Commission), following reconsideration of the Suspension Board's decision, also declined to suspend or investigate the proposed rate. Prior to the rate's effective date, however, petitioners sought, and obtained, from the court of appeals an order staying the effectiveness of the surcharge. The court directed the Commission to suspend the rate "until further order" of the court. Circuit Justice Blackmun in Docket No. A-45 subsequently denied ICG's motion to stay the court of appeals' stay decision.

4. On judicial review, a panel of the court of appeals enjoined ICG from "implementing" the surcharge and remanded the proceeding to the agency for a full hearing to determine the "appropriateness" of the rate increase (App. A, *infra*, 1a-11a).

The court first determined that the surcharge dispute "arises in connection with the abandonment proceedings" previously reviewed by the court and remanded to the Commission for further consideration (*id.* at 2a). The court then summarized the procedural history of the abandonment, and discussed the effects that abandonment of the line would have on the affected communities (*id.* at 3a).

Although the court rejected the petitioners' *de facto* abandonment argument—concluding that the only statutory criteria for a surcharge is the 110%/100% formula (*id.* at 5a-6a)—it reasoned that ICG deliberately tried to interfere with the court's remand on the abandonment question, given the "magnitude and timing" of the carrier's proposed surcharge (*id.* at 3a-4a). Therefore, although the court acknowledged the general rule that Commission decisions not to suspend tariffs are not reviewable under *Southern Ry.* v. *Seaboard Allied Milling*

Corp., 442 U.S. 444 (1979),[8] the panel claimed its jurisdiction arose from another "source": its power under the All Writs Act, 28 U.S.C. 1651(a), to review "the surcharge" in order to protect its jurisdiction over the remanded (and pending) abandonment (*id.* at 4a).

Petitioners before the Commission did not attempt to satisfy the statutory criteria governing light density lines surcharges. The court found, however, that petitioners in fact had no "opportunity" to show that the surcharge is above the statutory standard because the Commission had not promulgated final rules defining the "reasonably expected cost" component of the standard (*id.* at 6a-7a). Therefore, the court ordered the Commission to hold a hearing to allow the carrier and petitioners to submit evidence on the issue so that the Commission may determine the *permissibility* of the rate (*id.* at 8a). The court enjoined the railroad from implementing the tariff until the Commission makes that determination.

Petitioners have not yet filed a complaint under 49 U.S.C. (Supp. IV) 11701(b) [former Section 13(1) of the Interstate Commerce Act] which would entitle them to a full Commission inquiry into the lawfulness of the tariff.

REASONS FOR GRANTING THE PETITION

1. The court's decision in effect suspends the proposed surcharge and directs the Commission to undertake an investigation into its lawfulness. By its action, the court of appeals does what this Court has explicitly and repeatedly determined it may not, *i.e.*, impinge on the Commission's exclusive jurisdiction over rate suspension matters.

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[8]The court conspicuously omitted reference to the rule of nonreviewability as it relates to decisions not to investigate a tariff. In fact, *Seaboard Allied, supra*, involved a Commission decision not to order a hearing to investigate the lawfulness of a rate increase.

This Court has squarely held that courts lack jurisdiction to review non-final actions of the Commission suspending and investigation, or declining to suspend and investigate, rate increases filed by common carriers, or to enjoin increases which the Commission permitted to become effective.

In *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, 667 (1963), this Court ruled that the Commission has "the *sole and exclusive power* to suspend" new rates, and the judiciary was stripped of "any pre-existing power to grant injunctive relief" (emphasis added). In *Arrow*, this Court also held that a court could not enjoin a railroad from implementing a rate tariff after the Commission had suspended the tariff for the maximum period provided by the statute. Similarly, in *United States* v. *SCRAP*, 412 U.S. 669 (1973), this Court held that courts lack jurisdiction to review a Commission action declining to suspend a carrier-initiated tariff.

More recently, in *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979), this Court reversed an Eighth Circuit decision which enjoined a rate increase and sought to review a Commission decision terminating an investigation, on the ground that courts lack jurisdiction to review a non-final Commission decision declining to investigate a carrier-initiated tariff, even upon charges of a "patent illegality" (442 U.S. at 451).[9]

The clear and continuing Congressional purpose—as explained by this Court's numerous decisions—to oust the judiciary from impinging on the Commission's ex-

[9]In conformity with the rationale of these decisions, this Court has also held that courts cannot enjoin railroads from filing rates following a Commission investigation even where the standards used by the Commission to determine the lawfulness of the rates were found to be inadequately explained by the Commission thus necessitating a remand. See *Consolidated Rail Corp.* v. *National Association of Recycling Industries, Inc.*, 449 U.S. 607 (1981).

clusive suspension powers, is entirely applicable to this case.

First, the surcharge at issue in this case constitutes a carrier-initiated rate increase. As the foregoing decisions make clear, it is within the sole and exclusive province of the Commission to determine whether—and, if so, when—such an increase is to become effective. As the Court held in *Seaboard Allied, supra,* 442 U.S. at 458 n. 11:

> [I]t is conceded by all that the Commission has authority with respect to rates such as those at issue either to suspend (or investigate) them and that it has exercised its authority. The question raised is *whether it did so correctly* under the particular circumstances involved—a question that cannot be answered by a reviewing court without "independently apprais[ing] the [lawfulness] of the rat[e]." (Brackets in original, emphasis supplied).

Second, as in the foregoing cases, available administrative remedies have not been exhausted and the Commission's decision declining to suspend or investigate the surcharge is not final. Under the provisions of 49 U.S.C. (Supp. IV) 10705a, the shippers could have, and may still, attempt to establish that the rate including the surcharge exceeds the statutory standards applicable to light density line surcharges. If the shippers were to demonstrate that the surcharge exceeds that standard, the Commission could (but would not be required to) *cancel* that portion of the surcharge which exceeds the statutory standard. Petitioners below are also able to institute a complaint proceeding under 49 U.S.C. (Supp. IV) 11701 to review the lawfulness of the surcharge.

On these grounds, and on the basis of the authorities discussed above, the Courts of Appeals for the Fifth, Sixth, and Seventh Circuits have squarely held that Commission actions declining to suspend and investigate light density line surcharges filed under 49 U.S.C. (Supp.

IV) 10705a(b) are not reviewable.[10] The court's decision to review the Commission's nonfinal decision declining to suspend or investigate the surcharge, and to enjoin ICG from implementing the surcharge, is in direct conflict with these decisions as well as this Court's precedent. Certiorari should be granted to remedy this conflict.

2. The court's reliance on the All Writs Act as a "source" of jurisdiction to review the Commission's action is not a proper exception here to the general rule against reviewability.[11] We do not dispute that the court has jurisdiction over the pending abandonment proceeding and that it may, in appropriate circumstances, rely on

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[10]See, *Mississippi Public Service Comm'n* v. *ICC*, 662 F.2d 314 (5th Cir. 1981) (dismissing a petition for review and dissolving an emergency stay as to a surcharge proposed to apply to a branch line which was the subject of abandonment proceedings then pending before the Fifth Circuit on petition for review); *Aberdeen and Rockfish R.R. Co.* v. *United States*, 664 F.2d 41 (5th Cir. 1981); *Michigan Packaging Corporation* v. *ICC*, 665 F.2d 1045 (6th Cir. 1981) (dismissing petitions for review of a light density line surcharge because, under *Seaboard Allied*, "petitioners will be able to obtain full review at a later date and will be able to recover any charges the I.C.C. determines to be excessive"); *Henderson-Princeton Rail Retention Committee* v. *ICC*, 6th Cir., No. 81-3412 (dismissed Jan. 22, 1982); *People of the State of Ill.* v. *ICC*, 660 F.2d 289 (7th Cir. 1981) (denying a stay of a light density line surcharge alleged to be a *de facto* abandonment, because under *SCRAP-Arrow*, courts are barred " 'from entering disruptive injunctions against collection of rates not finally declared lawful or unlawful by the ICC' ").

[11]The court's opinion appears to rely upon a purported distinction between an order "that the ICC suspend the surcharge" and an injunction "directed to the ICG" not to implement the surcharge (App. A, *infra*, 8a-9a). Such a distinction is without merit. In *Arrow*, *supra*, this Court held that the railroads could *not* be enjoined by a court from implementing a rate increase after the Commission-imposed suspension period had elapsed.

the All Writs Act to take such actions as may be necessary to protect that jurisdiction. We submit, however, that preventing the tariff from taking effect is in no way necessary to preserve the court's jurisdiction. The effectiveness of ICG's surcharge is legally unrelated to its application for abandonment as the court itself appeared to recognize in rejecting petitioners' *de facto* abandonment argument (App. A, *infra*, 5a-6a).

The legal premise of the court's decision is incorrect. As this Court explained in *Arrow, supra*, 372 U.S. at 671, n. 22, the "limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction . . . has never been recognized in derogation of such a clear congressional purpose to oust judicial power as that manifested in the Interstate Commerce Act." Similarly, in *Atchison, T & S.F.R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 819 (1973)—the very case cited by the court in support of its alleged power to review and enjoin (App. A, *infra*, 4a)—this Court held that the reviewing court should not exercise its general equitable powers "to the extent that it might substantially interfere with the function of the administrative agency" and that the power to issue a stay " 'does not mean . . . that its exercise should be without regard to the division of functions which the legislature has made between the administrative body and the court of review.' "

The court's invocation of the All Writs Act in support of its decision violates the standards which have been held to circumscribe the issuance of writs under the statute. Use of exceptional writs is limited to "exceptional circumstances" involving some "usurpation of power", *Will* v. *United States*, 389 U.S. 90, 95 (1967), and where "the party seeking issuance of the writ [has] no other adequate means to attain the relief he desires," *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976). Neither of these criteria is satisfied in this case;

no finding has been made that the Commission has in any way acted in excess of its lawful authority and, as noted above, petitioners below have adequate remedies before the Commission which they have failed to pursue.

The Fifth Circuit recently addressed the issue of its power under the All Writs Act to assert jurisdiction over an ICG light density line surcharge in order to preserve its jurisdiction over a pending abandonment. In *Mississippi Public Service Comm'n* v. *ICC*, 662 F. 2d 314, 320 (5th Cir. 1981), the court stated (emphasis added):

> We do not believe that the issuance of a writ under §1651 would be appropriate in this case. Issuance of such a writ is particularly inconsistent with Congress' intent not to have courts review such non-final Commission orders. We therefore refuse to exercise any discretion which we might have under §1651. See *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976). *Petitioners have failed to demonstrate that review of the Commission decision in the abandonment case is in any way precluded by the absence of a stay of the surcharge.*

Likewise, there has been no showing in the instant case that review of the abandonment case is in any way precluded by the absence of a stay.[12] The court supports its holding by concluding that ICG imposed the rate in "bad

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[12]The court attempts to distinguish the Fifth Circuit's holding on the ground that the abandonment proceedings involving the surcharged line were not pending before that court (App. A, *infra*, 5a-6a). This distinction is plainly unsound. In its decision, the Fifth Circuit expressly noted that "there is pending before this Court . . . a petition for review of a decision by the Commission . . . authorizing the abandonment by ICG of the line." 662 F.2d at 315.

In any event, there is no particular significance to the point that there the abandonment appeal had been perfected. Authority under the All Writs Act "extends to the potential jurisdicition of the appellate court where an appeal is not then pending but may be later perfected." *FTC* v. *Dean Foods Company*, 384 U.S. 597, 603 (1966). Therefore, the considerations in *Mississippi*, *supra*, and the instant case are the same.

faith" and with the "intent" to interfere with the court's jurisdiction, pointing to the "magnitude and timing" of the surcharge (App. A, *infra,* 4a, 9a). However, this surcharge is one of many of similar magnitude that ICG imposed at around the same period.[13] The ICG's management program of seeking surcharges on many light density lines undercuts the court's conclusion that this one rate was "intended" to interfere with the court's jurisdiction.[14]

This Court should issue a writ of certiorari in order to resolve the conflict that now exists between the circuits over the proper exercise of judicial discretion under the All Writs Act to review non-final Commission actions that are generally held by this Court to be unreviewable.

3. Absent a formal complaint by petitioners under 49 U.S.C. (Supp. IV) 11701(b), only the Commission has the power to determine whether or not to institute an investigation into the lawfulness of the surcharge. *Seaboard Allied, supra,* 442 U.S. at 455-456. Petitioners below have not filed a complaint. Despite that clearly enunciated principle, the court remanded the case to the Commission and ordered the agency to conduct a hearing

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[13] *E.g.,* Suspension Case No. 70270, $495/car involving named stations in Mississippi, effective 2/1/81; Suspension Case No. 70450, $534/car on line in Mississippi, effective 6/20/81; Suspension Case No. 70481, $395/car involving line in Illinois, effective 7/18/81; Suspension Case No. 70482, $915/car on line in Kentucky, effective 7/18/81; Suspension Case No. 70575, $275/car on line in Mississippi, effective 10/3/81.

[14] The revenue evidence in the abandonment proceeding was nearly four years old at the effective date of the surcharge. One of the purposes of the new surcharge provisions was to permit revenue-needy carriers to quickly implement rate increases to cover *current* costs. The cost formulas were prescribed to avoid delay. H.R. Rep. No. 1430, 96th Cong., 2nd Sess. 112 (1980).

on the lawfulness of the surcharge.[15] In effect, the court orders the relief petitioners sought before the Commission—an investigation of the proposed surcharge. Such action is contrary to the holding in *United States* v. *Saskatchewan Minerals*, 385 U.S. 94 (1966), wherein this Court precluded a lower court from ordering the agency to grant the requested relief.

By ordering the Commission to investigate the lawfulness of the surcharge, the court engrafted its own notion of proper agency procedure upon the Commission, and therefore improperly intruded into the agency's well-defined decisionmaking process contrary to the holding in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 535-558 (1978).

We submit that the court of appeals clearly acted outside the scope of its authority and that its order requiring the Commission to institute an investigation into the lawfulness of the proposed surcharge must be overturned on review.

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[15]Language in the panel's decision clearly envisions a formal "investigation" into the rate's "lawfulness" without actually using those words. The panel orders a "hearing" at which the parties are to submit evidence on whether the surcharge is "proper" (App. A, *infra*, 3a), "permissible" (*id.* at 8a) and "appropriate" (*id.* at 9a). The Commission is then directed to make a "determination" following the hearing, and in fact ICG is enjoined from implementing the rate—tantamount to a suspension—until the agency makes that determination (*id.* at 3a, 9a).

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the errors in the opinion of the court of appeals are so plain that this Court might properly consider summary disposition on the merits under Rule 23.1.

Respectfully submitted.

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JULY 1982

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81-1607

City of Cherokee, Farmer's Co-Op, Archer Co-Op, Calumet Feed Service, Metz Baking Company, Ray Halder AGG Lime Service, Towena Elevator & Mill, C. S. Argo Corporation, Farmer's Co-Op George Iowa, Boyden AGG Lime and M. S. Stuckey,

Petitioners,

v.

Interstate Commerce Commission and United States of America,

Respondents.

Illinois Central Gulf Railroad Company,

Intervenor-Respondent.

On Petition for Review of Order of Interstate Commerce Commission.

Submitted: September 16, 1981

Filed: February 17, 1982

Before HEANEY, ROSS and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

This matter arises in connection with abandonment proceedings previously reviewed by this court. *See City of Cherokee v. ICC,* 641 F.2d 1220 (8th Cir. 1981). The Illinois Central Gulf Railroad (ICG) seeks to abandon service on a 96-mile branch line between Cherokee, Iowa, and Sioux Falls, South Dakota. ICG's abandonment application was initially denied by an administrative law judge who found that "public convenience and necessity" supported continued service on the line and that, under applicable cost accounting standards, the line made a positive contribution to ICG's income. *Id.* at 1223. The Interstate Commerce Commission (ICC), however, applied different cost criteria and a different standard for balancing the public and private interests affected by abandonment. The ICC voted to issue a certificate of abandonment, but we reversed and remanded the case for further proceedings consistent with proper abandonment standards. *Id.* at 1228-1230. We stayed our mandate, however, to permit the ICG and the ICC to seek review by the Supreme Court. The Justice Department argued that certiorari should be denied and that the matter should be reopened before the ICC. *See Memorandum for the United States,* S. Ct. Docket Nos. 80-2122 & 81-350. The Supreme Court subsequently denied certiorari, 50 U.S.L.W. 3278 (Oct. 13, 1981), and our mandate took effect. The abandonment proceedings have been reopened and appear to be near completion. *See* I.C.C. Docket No. AB-43 (Sub-No. 47) (Decision of Nov. 4, 1981, reopening proceedings and scheduling hearings for January, 1982).

Within weeks of our decision remanding the matter and while the certiorari petition was pending, ICG filed a unilateral tariff increase of more than $1,000 per car for all traffic moving on the branch line. This surcharge would more than double the present freight rates on the line. The ICC accepted the surcharge and refused petitioners' request to suspend and investigate it. We stayed the surcharge pending this decision. We now remand the rate proceeding to the ICC for a hearing at which the petitioners and the ICG may show whether the surcharge is proper under the criteria set forth in the Staggers Rail Act. ICG is enjoined from implementing the surcharge until such time as the foregoing hearing is held and the ICC makes a determination based thereon.

The petitioners herein are citizens, shippers and local governments that rely on the branch line which ICG seeks to abandon. As we earlier found, abandonment would have a devastating effect both on the petitioners' economic lives and on the essential quality of life in the affected communities. *See id.* at 1224-1225, 1229-1230. The petitioners contend that the $1,000-per-car surcharge is designed to effect a *de facto* abandonment of the branch line—achieving in practice what this Court held is impermissible at the present time.[1] The petitioners, therefore, construe the rate surcharge as an attempt to interfere with this Court's jurisdiction and to thwart the clear mandate of this Court. We agree.

The timing of the ICG's action is more than suspect. Within weeks of our initial decision remanding the abandonment matter, the ICG announced that it would immediately increase by more than one hundred percent the freight charges for all commodities that move on the

[1]We intimate no views with respect to the reopened abandonment proceedings. Our unambiguous holding, however, was that the ICG could not abandon the line based upon the showing it had made.

branch line. The petitioners' verified complaint indicates, based upon a canvas of shippers along the affected line, that no freight will move if the surcharge becomes effective. Even if traffic is not eliminated totally, a significant reduction in traffic appears to be an obvious result. Such a reduction in traffic and related revenues would fundamentally alter the reopened abandonment proceedings by turning what the ALJ found to be a marginally successful line into a certain loser. Given the magnitude and timing of ICG's proposed surcharge, we must conclude that it was deliberately imposed to interfere with our remand of the abandoment question, if not to render the abandonment proceedings moot.[2]

Despite these circumstances, the ICG and the ICC argue that this Court has no power to review the surcharge, relying on the rule that ICC decisions not to suspend a tariff are generally not reviewable. *See, e.g., Consol. Rail Corp.* v. *Nat. Ass'n of Recycling Ind.*, ____ U.S. ____, 101 S.Ct. 775, 777 (1981) (per curiam); *Southern Railway Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979).

We recognize this general rule, but find no need to disturb it. Our jurisdiction arises from quite another source: this Court has the power to review the surcharge to the extent that is necessary to protect our undisputed jurisdiction over the abandonment proceedings. *See, e.g.*, 28 U.S.C. § 1651(a) (1980) (All Writs Act); *Atchison, T. & S.F. R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 820 (1973). This source of jurisdiction is narrow, but here, the petitioners have made a prima facie showing that the surcharge is intended to interfere with our clear mandate and jurisdiction in the abandonment case. In such circumstances, the power to review the surcharge arises out

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[2]The ICG has never disputed these [illegible]s as to its intent and the effect of its surcharge. ICG argues such considerations are immaterial. *See infra* at 9.

of necessity. Because these are not the ordinary circumstances in which rate questions arise, invoking jurisdiction in this case will have little impact on the general doctrine of nonreviewability.[3]

The merits of the surcharge present a more difficult question. The petitioners ask us to declare the surcharge unlawful on the theory that any surcharge which will effect a *de facto* abandonment is an illegal circumvention of the statutory requirements for abandonment. We cannot accept this theory in light of the Staggers Rail Act of 1980.

We first note that before passage of the Staggers Act, a unilateral surcharge such as ICG's would have been impossible. The Staggers Act, however, authorizes railroads to publish a branch line surcharge if, without such a surcharge, revenues from the line would not cover 110% of the variable costs of transporting traffic to or from the line, plus one hundred percent of the railroad's "reasonably expected costs" of continuing to operate the line. *See* 49 U.S.C. § 10705a(b)(2) (Supp. 1981). Although there are several procedures by which shippers may protest a surcharge, the Staggers Act expressly prohibits the ICC from reducing the surcharge rates to a level below the 110%/100% formula. *See id.*, §§ 10705a(a)(1)(B)(iv), (a)(3)(B), (b)(3)(C). Thus, the statute sets a minimum revenue standard which a railroad may seek to achieve through a surcharge.

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[3]ICG relies in part on several recent Circuit Court decisions which indicate that ICC decisions not to suspend surcharges are unreviewable. *See, e.g., Mississippi Pub. Service Comm. v. ICC*, Nos. 81-4407 & 81-4410 (5th Cir., Nov. 9, 1981). None of the cases cited by the ICG involved surcharges which were attempts to interfere with the Court's abandonment jurisdiction. In *Mississippi Pub. Service Comm. v. ICC, supra*, abandonment proceedings were in progress before the ICC at the time of the surcharge, but such proceedings were not before the Court. Because the All Writs Act does not create jurisdiction where none previously existed, it may have been appropriate to

The petitioners' contention is that, regardless of whether a surcharge meets the 110%/100% standard, it is *per se* unlawful if its effect will be to eliminate movement of traffic on the line. There is no basis in the statute, however, for applying such a *de facto* abandonment standard. Moreover, to apply such a standard would require us to engage in impossible factfinding. We would first have to resolve disputes between shippers and carriers as to the effect of a particular surcharge. Even assuming, for example, that the proposed surcharge here would result in a *de facto* abandonment, by what criteria are we to determine whether a lesser surcharge is permissible, and if so, at what level? We must turn to the statute for such criteria and the statute clearly sets forth the 110%/100% formula. Congress has declared that this standard is controlling and it is to Congress that the petitioners must turn for relief if a surcharge which meets this standard will result in *de facto* abandonment.

There has been no determination, however, that the $1,000-per-car surcharge does in fact comport with the statutory standard. The petitioners, the ICG and the ICC have all focused on the *de facto* abandonment theory. Indeed, the petitioners could not have shown whether the surcharge exceeds the statutory formula because the ICC had failed to promulgate rules defining the "reasonably expected cost" component of the formula. The issue thus becomes whether the petitioners should have an opportunity to demonstrate to the ICC that the proposed surcharge exceeds the statutory formula or is otherwise impermissible under the Staggers Act. We think they should.

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decline to invoke the Act in *Mississippi*. Here, however, this Court has undisputed jurisdiction over the abandonment proceedings and has remanded the matter to the ICC. Having found that the surcharge is an attempt to interfere with our mandate, it is necessary and appropriate to protect our jurisdiction under the All Writs Act.

In adopting the Staggers Act, Congress gave railroads sweeping new powers to set their own rates, but imposed the 110%/100% standard as a check against abuse of such power. As the legislative history states: "[a] shipper's remedy is to protest the rate on the grounds that the surcharge exceeds 110 percent of the variable costs of carrying the traffic to the line and 100 percent of the reasonably expected costs of continuing service over the line." H. Rep. No. 96-1035, *reprinted in* 4 U. S. Code, Cong. & Admin. News, 3987 (1980). The Staggers Act requires the ICC to turn over to protestants, within five days of a request, the cost and revenue data upon which the protestants may make this evidentiary showing. The legislative scheme is clearly designed to provide prompt *and fair* resolution of rate disputes. Railroads may unilaterally publish tariff increases, but affected parties must be afforded a prompt opportunity to demonstrate the excessiveness of a particular surcharge. Such a scheme should prevent excessive unilateral surcharges from causing irreparable harm before the ICC could adjust them.[4]

Here, however, the petitioners have not had the opportunity which the statute intends them to have. An essential element of the surcharge standard allows recovery of the "reasonably expected cost of continuing service over the line." This is a new standard which Congress required the ICC to define within 120 days of the Act's passage (October 1, 1980). *See* § 10705a(b)(2). Although Congress provided an interim standard for this three-

[4]According to the legislative history of the Staggers Act, Congress recognized that "[a] rapid change in the present law might * * * disrupt the national rail system." H. Rep. No. 96-1035, *reprinted in* 4 U. S. Code, Cong. & Admin. News, 3986 (1980). The stated intent is that the surcharge provision "establish a *moderate* procedure" by which railroads may achieve the minimum revenue standard set out in the Act. *Id.* [emphasis added].

month period, it is inconceivable that such a temporary gap filler would become the standard. The "reasonably expected costs" standard is part of a crucial check on the new railroad rate-setting powers and is to be specially defined for those purposes. The ICC, however, had failed to adopt rules defining this cost standard at the time of the ICG's surcharge in June of 1981—well beyond the time Congress mandated that such standards would be available. Thus, the petitioners could not even identify "reasonably expected costs," much less establish whether the surcharge would exceed such costs.

We think the rate issue should be remanded to the ICC for a hearing at which the petitioners and the ICG can offer evidence with respect to the permissibility of the surcharge under the Staggers Act.[5] To the extent "reasonably expected costs" are a factor in this issue, the petitioners must have an opportunity to apply the standard for such costs that is adopted by the ICC through its rulemaking. The ICC has proposed such rules and received comments thereon, *see* 46 Fed. Reg. 9670 (1981), and has represented that promulgation of final rules is imminent. Thus, no significant delay should be occasioned by allowing the parties to apply such final rules to ICG's surcharge.

The ICG is enjoined from implementing the surcharge until such time as the foregoing hearing is held and the

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[5]Such hearing would, of course, address the applicability of the 110%/100% standard to the present surcharge. We note that one requirement for certain surcharges is that the railroad be earning "inadequate revenues" as defined in the Staggers Act. *See* § 10705a(b)(1)(A). Although the ICC has determined that ICG's revenues are inadequate, *see* 364 I.C.C. 803, 826 (1981), the carrier has previously made somewhat contrary assertions. *See Railway Age*, Nov. 26, 1979 (quoted remarks of the chairman of ICG regarding the ICC's "error of describing ICG as a financially troubled railroad"). It is not necessary for us to review this issue on the present record.

ICC makes a determination based upon the record developed at such hearing. This is not an order that the ICC suspend the surcharge, and we do not review the merits of any action by the ICC. The injunction is directed to the ICG and is based upon our narrow jurisdiction to review its surcharge. The ICG has never denied that its intent and the effect of its surcharge are to reduce traffic on the line or to render the abandonment proceeding moot. It has argued that such considerations are irrelevant to whether it may impose the surcharge. We agree that bad faith by the ICG does not prevent it from imposing a surcharge which meets the 110%/100% statutory standard. Such bad faith is highly relevant, however, to whether this Court should enjoin the surcharge to protect its jurisdiction until the ICC makes a determination as to the appropriateness of the surcharge. The petitioners have made a prima facie showing that the surcharge is an attempt to interfere with our jurisdiction over the abandonment matter. Any excessive amount of the surcharge could irreparably harm the petitioners and irreparably impair the mandate of this Court in the abandonment matter. On the other hand, the proceeding for which we remand this matter should be a prompt one, such that any delay in collecting a legitimate surcharge would be minimal. The injunction is, therefore, necessary and proper. This case is hereby remanded for further proceedings consistent with this opinion.

A True Copy:

Attest:

Clerk, U. S. Court of Appeals,
Eighth Circuit.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81-1607

	)	September Term, 1981
City of Cherokee, Farmer's Co-op, Archer Co-op, Calumet Feed Service, Metz Baking Company, Ray Halder AGG Lime Service, Rowena Elevator & Mill, C.S. Agro Corp., Farmer's Co-op George Iowa, Boyden AGG Lime and M.S. Stuckey,	)	
Petitioners,	)	
vs.	)	Petition for Review of Order of Interstate Commerce Commission
Interstate Commerce Commission and United States of America,	)	
Respondents.	)	
Illinois Central Gulf Railroad Company,	)	
Intervenor-Respondent.	)	

This cause was submitted on petition for review of an order of the Interstate Commerce Commission, administrative record and briefs of the parties.

On consideration Whereof, it is now here ordered and adjudged by this Court that this cause be and is hereby remanded to the Interstate Commerce Commission for further proceedings consistent with the opinion of this Court filed this date.

It is further ordered that the Illinois Central Gulf Railroad Company is enjoined from implementing the surcharge under the provision of the opinion.

February 17, 1982

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81-1607

City of Cherokee, et al,	)	September Term, 1981
Petitioners,	)	
vs.	)	Petition for Review of Order of Interstate Commerce Commission
Interstate Commerce Commission, et al,	)	
Respondents.	)	
Illinois Central Gulf Railroad Company,	)	
Intervenor-Respondent.	)	

The Court, having considered respondent's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

March 31, 1982

APPENDIX D

Service Date
Jun. 17, 1981

INTERSTATE COMMERCE COMMISSION
Office of the Secretary
Washington, DC 20423

Suspension Case No. 70441
June 12, 1981

NOTICE:

A majority of Division 1 (Commissioners Clapp, Alexis and Gilliam - Commissioner Alexis not participating), acting as an appellate division, voted today not to suspend and not to investigate Illinois Central Gulf Railroad Company's (ICG), Chicago, IL, proposal to establish a light density line surcharge of $1,004.00 per car on ICG lines between Cherokee, IA, and Sioux Falls, SD. The proposal, published to become effective June 13, 1981, appears in Supplements 8 and 9 (Item 220) to ICC ICG 8006.

A joint protest was received from City of Cherokee, IA, Farmer's Co-op, Archer Co-op, Calumet Feed Service, Metz Baking Company, Ray Halder Agg Lime Service, Rowena Elevator & Mill, C. S. Agro Corp., Farmer's Co-op George, Iowa, Boyden Agg Lime, and M. S. Stuckey. A reply to the protest was filed by ICG.

The Suspension Board, Members Fitzgerald, Halvarson and O'Malley had concluded on June 10, 1981, not to suspend and not to investigate. The action of Division 1 followed reconsideration of the Board's action.

JAMES H. BAYNE
Acting Secretary

APPENDIX E

TITLE 49, UNITED STATES CODE §10705a.

(b)(1) Notwithstanding subsection (a) of this section—

(A) a rail carrier not earning adequate revenues, as determined under section 10704(a)(2) of this title, may publish and apply a surcharge applicable to traffic originating or terminating upon any of its lines that carried less than 3,000,000 gross ton miles of traffic per mile in the most recent calendar year for which traffic data is available; and

(B) a rail carrier earning adequate revenues, as so determined, may publish and apply a surcharge applicable to traffic originating or terminating upon any of its lines that carried less than 1,000,000 gross ton miles of traffic per mile in such most recent calendar year.

Such a surcharge may be applied without the concurrence of any rail carrier. Any such surcharge may be allocated, subject to the provisions of paragraph (4) of this subsection, in different amounts among different movements between different origins and destinations, and shall accrue solely to the surcharging carrier.

(2) A rail carrier may apply a surcharge under this subsection if, prior to the application of such surcharge, that portion of the charges applicable to traffic to and from the line to which the surcharge applies and accruing to the surcharging carrier does not provide such carrier revenues adequate to cover—

(A) 110 percent of such carrier's variable cost of transporting the traffic involved to or from such line; plus

(B) 100 percent of such carrier's reasonably expected costs of continuing to operate such line, which shall include all costs necessary to sustain service on the line.

The Commission shall, within 120 days after the effective date of the Staggers Rail Act of 1980, complete a proceeding to define the term "reasonably expected costs" as used in subparagraph (B) of this paragraph. In the interim, the term shall be construed in accordance with Rail Services Planning Office subsidy standards.

(3)(A) Upon petition of a shipper located upon a line to which a surcharge under this subsection is applied, the Commission may cancel the application of a surcharge under this subsection if such shipper demonstrates to the Commission that, after application of the surcharge, the surcharging carrier's revenues from all traffic originating or terminating upon the line to which the surcharge applies exceed 110 percent of such carrier's variable cost of transporting all traffic to or from such line plus such carrier's reasonably expected costs of continuing to operate such line.

(B)(i) A rail carrier's revenue from all traffic originating or terminating upon a line shall be presumed to exceed 110 percent of its variable cost of transporting all traffic to or from such line plus its reasonably expected costs of continuing to operate such line if the complaining shipper demonstrates that the carrier is earning revenues from all traffic originating or terminating upon such line that result in a revenue-variable cost percentage that is equal to or greater than the revenue-variable cost percentage applicable in that year under section 10709(d) of this title.

(ii) A surcharging carrier may rebut the presumption set forth in clause (i) of this subparagraph by demonstrating to the Commission that its reasonably expected costs

for operating the line to which the surcharge applies exceed the percentage of variable cost set forth in such clause (i).

(C) Upon a finding by the Commission that application of the surcharge will produce revenues in excess of 110 percent of the surcharging carrier's variable cost of transporting traffic to or from the line plus its reasonably expected costs for operating the line, the Commission shall determine the level of surcharge which would produce revenues equal to such figure and shall authorize such carrier immediately to apply such surcharges as will generate such revenues without any further proceedings, subject only to the right of a shipper to proceed under paragraph (4) of this subsection.

(4)(A) A rail carrier may not apply a surcharge under this subsection that results in any shipper being required to bear more than a reasonable proportion of the reasonably expected costs of continuing to operate the line to which such surcharge applies.

(B) Upon complaint of a shipper, the Commission shall determine whether the shipper is being required to bear more than a reasonable proportion of the costs described in subparagraph (A) of this paragraph.

(C) If the Commission finds that a complaining shipper is being required to bear more than a reasonable proportion of the costs described in subparagraph (A) of this paragraph, the Commission may reallocate the surcharge among the traffic originating or terminating on the line to which the surcharge applies, but may not order relief which would result in the surcharging carrier earning revenues less than those which the carrier would have earned had the surcharge been applied as filed.

(5) A shipper may, in a single complaint, seek relief under paragraphs (3) and (4) of this subsection. In any such complaint, the Commission shall first determine the

right to relief under paragraph (3) and shall grant such relief as is appropriate under such paragraph.

(6) In any proceeding brought before the Commission challenging the application or amount of a surcharge under this subsection, whether the surcharge is claimed to violate this subsection or some other provision of this chapter, the Commission shall not suspend the application of any such surcharge unless the person filing the verified statement required by section 10707(c) of this title, in addition to the matters required by such section, also makes the demonstration required by paragraph (3)(A) of this subsection. If the demonstration required by such paragraph (3)(A) is made, the Commission may suspend the application of only so much of the surcharge as will produce revenues in excess of the amount so demonstrated.

TITLE 28, UNITED STATES CODE §1651

§1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

FILED
SEP 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

CITY OF CHEROKEE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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September 1, 1982

THE GARLAND PRESS, INC. – 917 E Street N.W. – Washington, D.C. – 783-0370

QUESTIONS PRESENTED

The questions presented by petitioner are not supported by the decision below or by the record. Contrary to petitioner, the court of appeals did not enjoin the I.C.C. from allowing the surcharge to go into effect. Rather, the court below enjoined the railroad (not a petitioner herein) from implementing the surcharge. Moreover, the court of appeals' review of the agency action was limited and did not extend to the merits. 671 F. 2d at 1085. (Pet. App. 9a):

> "This is not an order that the ICC suspend the surcharge, and we do not review the merits of any action by the ICC. The injunction is directed to the ICG and is based upon our narrow jurisdiction to review its surcharge."

We fail to see any substantial question presented for review.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-163

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

CITY OF CHEROKEE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 671 F. 2d 1080. (Pet. App. 1a-11a).[1] The earlier opinion of the court of appeals is reported at *City of Cherokee* v. *I.C.C.*, 641 F. 2d 1220, (cert. den. ____U.S.____, 102 S.Ct. 387-88, 70 L.Ed.2d 206 (October 13, 1981).

The notice of action by Division 1 of the Interstate Commerce Commission is unreported. (Pet.App. 13a). The earlier decision is reported at *Illinois Central Gulf R. Co.-Abandonment,* 363 I.C.C. 93 (1980).

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[1]"Pet. App." refers to the appendix to the petition for writ of certiorari.

STATEMENT

This litigation arises from the effort by Illinois Central Gulf Railroad Company ("ICG") to abandon its 96-mile line between Cherokee, Iowa, and Sioux Falls, South Dakota.[2] The Interstate Commerce Commission ("I.C.C.") approved ICG's application to abandon the line, *Illinois Central Gulf R. Co.-Abandonment,* 363 I.C.C. 93 (1980), but the court of appeals reversed and remanded for further proceedings consistent with proper abandonment standards. *City of Cherokee* v. *I.C.C.*, 641 F. 2d 1220 (8th Cir. 1981). Last term this Court denied the separate petitions for writ of certiorari sought by ICG and by I.C.C. to review the abandonment decision rendered by the court of appeals. No. 80-2122, *Illinois Central Gulf Railroad Company* v. *City of Cherokee;* No. 81-350, *Interstate Commerce Commission* v. *City of Cherokee,* ____U.S.____, 102 S.Ct. 387-88, 70 L.Ed.2d 206 (October 13, 1981).

Within weeks of the decision by the court of appeals remanding the abandonment matter, and while certiorari petition was still pending, ICG posted a unilateral tariff increase of more than $1,000 per car for all traffic moving to or from the branch line. This surcharge would more than double the freight rates on the line. The ICC accepted the surcharge and refused the request to suspend and investigate it. However, the court of appeals stayed the surcharge, and its stay action was sustained by the Circuit Justice on July 24, 1981.[3]

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[2]A short 2-mile stretch of the line would be retained near Cherokee, for use as an industrial spur. 363 I.C.C. at 95 n.1.

[3]No. A-45, Oct. Term. 1981, *Illinois Central R. Co.* v. *City of Cherokee.*

The mandate of the court of appeals took effect following this Court's denial of the petitions for writ of certiorari on October 13, 1981. The I.C.C. on November 4, 1981, reopened the abandonment proceeding, with hearings scheduled for January, 1982, *infra*, pp. 15-16.[4]

The instant petition for writ of certiorari involves the punitive $1,000 per car surcharge. The surcharge was found by the court of appeals to interfere with its jurisdiction over the abandonment case, and to thwart its clear mandate. Moreover, the court of appeals found that ICG deliberately had imposed the surcharge so as to interfere with the court's remand of the abandonment question. The court of appeals stated in its February 17, 1982 opinion, 671 F. 2d at 1082 (Pet.App. 3a-4a):

> "The petitioners herein are citizens, shippers and local governments that rely on the branch line which ICG seeks to abandon. As we earlier found, abandonment would have a devastating effect both on the petitioners' economic lives and on the essential quality of life in the affected communities. (citations omitted). The petitioners contend that the $1,000-per-car surcharge is designed to effect a *de facto* abandonment of the branch line-achieving in practice what this Court held is impermissible at the present time. (footnote omitted) The petitioners, therefore, construe the rate surcharge as an attempt to intervere with this Court's jurisdiction and to thwart the clear mandate of this Court. We agree.
>
> "The timing of the ICG's action is more than suspect. Within weeks of our initial decision

[4]The hearings concluded in March, with briefs filed in late April, 1982. The parties await an agency decision. (Pet. 5 n.7). The November 4, 1981 agency order is mentioned to by the Court of Appeals in its decision. 671 F. 2d at 1082. (Pet. App. 1a).

> remanding the abandonment matter, the ICG announced that it would immediately increase by more than one hundred percent the freight charges for all commodities that move on the branch line. The petitioners' verified complaint indicates, based upon a canvas of shippers along the affected line, that no freight will move if the surcharge becomes effective. Even if traffic is not eliminated totally, a significant reduction in traffic appears to be an obvious result. Such a reduction in traffic and related revenues would fundamentally alter the reopened abandonment proceedings by turning what the ALJ found to be a marginally successful line into a certain loser. Given the magnitude and timing of ICG's proposed surcharge, we must conclude that it was deliberately imposed to interfere with our remand of the abandonment question, if not to render the abandonment proceedings moot."

The court of appeals pointed out that ICG has never disputed the claims that the intent and the effect of its surcharge are to moot the abandonment proceeding:

> "The ICG has never disputed these claims as to its intent and the effect of its surcharge. ICG argues such considerations are immaterial." 671 F. 2d at 1083. (Pet.App. 4a).

> "The ICG has never denied that its intent and the effect of its surcharge are to reduce traffic on the line or to render the abandonment proceeding moot." 671 F. 2d at 1085. (Pet. App. 9a).

ICG and ICG argued that the court of appeals has no power to review the surcharge, relying on the rule that the ICC decisions not to suspend a tariff are generally not reviewable, e.g., *Consolidated Rail Corp.* v. *Recycling Industries,* 449 U.S. 609, 612 (1981); *Southern Railway Co.* v. *Seabord Allied Milling Corp.,* 442 U.S. 444 (1979). But

the court of appeals fully recognized that rule, and based its jurisdiction upon the power to review the surcharge *"to the extent that it is necessary to protect our undisputed jurisdiction over the abandonment proceedings,"* 671 F. 2d at 1083. (Pet. App. 4a).

The court of appeals noted that before passage of Staggers Rail Act of 1980, a unilateral surcharge such as ICG's would have been impossible. The Staggers Act authorizes railroads to publish a branch line surcharge if, without such surcharge, revenues from the line would not cover 110% of the variable costs of transporting traffic to or from the line, plus 100% of the railroads' "reasonably expected costs" of continuing to operate the line. 49 U.S.C. 10705a(b)(2). P.L. 96-448, 94 Stat. 1917-18. The 110%/100% formula is a minimum revenue standard below which the I.C.C. may not reduce a surcharge. 671 F. 2d at 1083. (Pet. App. 5a).

The court of appeals found there has been no determination whether the $1,000-per-car surcharge does in fact comport with the statutory standard. Although the Staggers Act required the I.C.C. to define the term "reasonably expected costs" within 120 days from the effective date of the Staggers Act, i.e., by January 29, 1981, the agency still had not rendered a determination of "reasonably expected costs" over a year later, at the time the court of appeals on February 17, 1982 made its ruling in this surcharge case. Indeed, the I.C.C. had not issued its decision for "reasonably expected cost at the time the I.C.C. on July 30, 1982 filed its petition for a writ of certiorari herein.[3] 49 U.S.C. 10705a(b)(2) provides:

[3]The I.C.C.'s petition for a writ of certiorari alludes to the forthcoming issuance of a decision on "reasonably expected costs." (Pet. 3 n.4). The decision was served August 4, 1982, to become effective September 3, 1982. Ex Parte 402, *Reasonably Expected Cost,* 365

> The Commission shall, within 120 days after the effective date of the Staggers Rail Act of 1980, completed a proceeding to define the term 'reasonably expected costs' as used in sub-paragraph (B) of this paragraph. In the interim, the term shall be construed in accordance with Rail Services Planning Office subsidy standards.

The court of appeals stated that although Congress provided an interim standard for the 120-day period between October 1, 1980 and January 29, 1981, it is inconceiveable that such at temporary gap filler would become the standard, 671 F. 2d at 1084. (Pet. App. 7a-8a). The I.C.C. had failed to adopt rules defining "reasonably expected costs" at the time of the ICG's June, 1981 surcharge, such that the objectors could not even identify "reasonably expected costs," much less establish whether the surcharge would exceed such costs. 671 F. 2d at 1084. (Pet. App. 8a).

Accordingly, the court of appeals remanded the rate issue to the I.C.C. for a hearing at which the objectors and the railroad can offer evidence with respect to the permissibility of the surcharge under the Staggers Act; and the court of appeals enjoined ICG from implementing the surcharge until such time as the hearing is held and the agency makes a determination based upon the record which maybe developed. 671 F. 2d at 1084-85. (Pet. App. 8a-9a).

The court of appeals made it clear that this was not an order that the I.C.C. suspend the surcharge, and the court did not review the merits of any action by the I.C.C.; the injunction against the surcharge is directed to ICG, and is

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I.C.C. 819. However, the I.C.C.'s decision is the subject of pending petitions to reopen by the railroad industry, and others, such that it is highly uncertain the September 3 rules will be the final rules.

based upon the court's narrow jurisdiction. Although bad faith by ICG does not prevent ICG from imposing a 110%/110% surcharge, the court held such bad faith by ICG is highly relevant to whether the court should enjoin the surcharge until the I.C.C. makes a determination as to the appropriateness of the surcharge. 671 F. 2d at 1085. (Pet. App. 9a):

> "This is not an order that the ICC suspend the surcharge, and we do not review the merits of any action by the ICC. The injuction is directed to the ICG and is based upon our narrow jurisdiction to review its surcharge. The ICG has never denied that its intent and the effect of its surcharge are to reduce traffic on the line or to render the abandonment proceeding moot. It has argued that such considerations are irrelevant to whether it may impose the surcharge. We agree that bad faith by the ICG does not prevent it from imposing a surcharge which meets the 110%/110% statutory standard. Such bad faith is highly relevant, however, to whether this Court should enjoin the surcharge to protect its jurisdiction until the ICC makes a determination as to the appropriateness of the surcharge. The petitioners have made a prima facie showing that that the surcharge is an attempt to interfere with our jurisdiction over the abandonment matter. Any excessive amount of the surcharge could irreparably harm the petitioners and irreparably impair the mandate of this Court in the abandonment matter.

The ICG and I.C.C. separately sought rehearing en banc, which petitions on March 31, 1982 were denied by the court of appeals. (Pet. App. 12a).[6] The I.C.C. alone, has petitioned for a writ of certiorari.

[6]The order denying ICG's petition for rehearing is not set forth, but follows the text of the court's disposition of the I.C.C.'s petition.

REASONS WHY THE WRIT SHOULD BE DENIED

This case rests largely on its own peculiar facts and creates no conflict among the circuits. Nor is there any legal issue of national importance. The injunction of the court of appeals runs against the railroad – not the petitioner; and the railroad does not seek a writ of certiorari.

1. *The Court of Appeals did not commit error.* The first ground advanced by Petitioner I.C.C. is that the court of appeals simply committed error, which the Supreme Court should correct.[7] (Pet. 7-10) The I.C.C. relies upon *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658 (1963), and its progeny,[8] to the effect that the I.C.C. has the sole and exclusive power to suspend railroad rates, together with decisions in the Fifth, Sixth and Seventh Circuits declining to suspend and investigate light density line surcharges filed under 49 U.S.c. 10705a(b). (Pet. 9-10, n.10).[9]

But the court of appeals made it clear it was not reviewing the merits of any action by the I.C.C. The court's remand is for determining the permissibility of the surcharge under the Staggers Act. The injunction runs solely against ICG – which has elected not to seek certiorari. The court

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[7]The I.C.C. requests summary disposition on the merits, just as it did last term without success in No. 81-350, *I.C.C.* v. *City of Cherokee*, cert. den. 102 S.Ct. 387-88, 70 L.Ed.2d 206 (10/13/81).

[8]*United States* v. *SCRAP*, 412 U.S. 669 (1973); *Southern R. Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979); *Consolidated Rail Corp.* v. *Recycling Industries*, 449 U.S. 609 (1981).

[9]The I.C.C.'s reference to *Aberdeen and Rockfish R. Co.* v. *United States*, 664 F.2d 41 (5th Cir. 1981), is misplaced, for a "commodity" surcharge was involved under subsection 10705a(a) rather than a "light density" surcharge under subsection 10705a(b).

of appeals acted under the All Writs Act to protect its jurisdiction over the abandonment proceeding which it had remanded, and which was pending petitions for writ of certiorari. 671 F. 2d at 1083-8. (Pet. App. 4a-9a.)

Moreover, 49 U.S.C. 10705a is a brand new enactment, and contains certain mandatory terms not present in the usual rate suspension provisions of 49 U.S.C. 10707. Although one court found it unnecessary to make a determination on the point, it noted that Congress may have created judicially reviewable duties in the I.C.C. under certain provisions of section 10705a. *Southern Ry. Co.* v. *I.C.C.*, 681 F. 2d 29, 33 (D.C. Cir. 1982). Here, Congress mandated the I.C.C. to prescribe rules for "reasonably expected costs" on or before January 29, 1981. Yet the I.C.C. did not do this until August 4, 1982, after this petition for writ of certiorari was filed.[10] Perhaps more important, the $1,000 per car surcharge is not a *bona fide* effort by ICG to maximize revenues; that is, it is not a legitimate freight rate, but is instead a "bad faith" method to usurp the jurisdiction of the court of appeals over the abandonment decision mandate. The court of appeals so found, and ICG never denied the real purpose of its surcharge. In this Court, the I.C.C. does not deny the real intent and effect of the proposed surcharge. The agency is an important party to the abandonment case, and would avoid judicial review of its abandonment action on remand. The I.C.C. thus seeks to thwart the mandate of the court of appeals in the abandonment case.

The non-reviewability maxim does not apply where "blantently lawless action" is involved. *Atchison, T. &*

[10]The "reasonably expected costs" decision becomes effective September 3, 1982, 365 I.C.C. 819, 835, but may be altered on reconsideration, *supra*, n. 5.

S.F.R. Co. v. *Wichita Bd. of Trade*, 412 U.S. 800, 822-23 n.16 (1973). The I.C.C. overstepped the bounds of its authority in aiding the threatened interference with the jurisdiction of the court of appeals in the abandonment case. The courts have jurisdiction to determine whether the I.C.C. has overstepped the bounds of its authority in a rate matter. *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 638-39 n.17 (1978).

The decisions in the other circuits do not support the I.C.C.'s claim, and clearly are distinguishable. None of these other cases involved the situation where a court had set aside a line abandonment decision, with a remand to the agency, and the railroad (with I.C.C. blessing) then countering with a punitive surcharge of over $1,000 per car, all at time the opinion of the court of appeals is pending certiorari to the U.S. Supreme Court.[11]

The court of appeals did not commit error.

2. *Use of All Writs Act is proper.* The second ground advanced by petitioner I.C.C. is that the All Writs Act, 28 U.S.C. 1651(a), is not a valid source of jurisdiction to make an exception to the general rule against reviewability. (Pet. 10-13). Although the I.C.C. recognizes that the court of appeals has jurisdiction over the pending abandonment proceeding, and may take such action under the All Writs Act to protect that jurisdiction, the agency nevertheless asserts that preventing the tariff from taking effect is not necessary to preserve the court's jurisdiction. The I.C.C. refers to the decision in *Mississippi Public Service Comm'n* v. *I.C.C.*, 662 F. 2d 314 (5th Cir. 1981).

[11]The Seventh Circuit decision noted that the decision below may have been permissible because a petition for certiorari was pending in the abandonment case at the time the stay of the surcharge was granted. *People of State of Ill.* v. *I.C.C.*, 660 F.2d 289, 291 n.4 (7th Cir. 1981).

However, the court of appeals expressly found that little or no freight would move if the surcharge becomes effective, and that it was likely the abandonment proceedings would be rendered moot. 671 F. 2d at 1083. (Pet. App. 4a. Indeed, these respondents cannot continue to devote resources against the abandonment if the surcharge becomes effective. The line effectively will be abandonment if service is discontinued as a result of a $1,000 per car surcharge. Since the court of appeals recognized that the Staggers Act nonetheless permits light density line surcharges under a "reasonably expected costs" standard, the court of appeals accordingly remanded for a determination whether the $1,000 per car surcharge met the Staggers Act standard.

The I.C.C.'s reliance upon *Mississippi Public Service Comm'n* v. *I.C.C., supra* is misplaced. The objectors to the surcharge in that case apparently failed to demonstrate that review of the abandonment decision would be precluded by the absence of a stay of the surcharge. As indicated elsewhere in the I.C.C. petition (Pet. 13 n.13), the surcharge in the *Mississippi* case was only $275 per car; and as a matter of fact, the Fifth Circuit declined to stay the I.C.C.'s abandonment decision pending judicial review, so that the I.C.C.'s abandonment order became effective and was never reviewed by that court of appeals. Thus the *Mississippi* case is wholly dissimilar to the instant proceeding.

3. *Filing of formal complaint unnecessary.* The third ground urged by petitioner I.C.C. is that absent a formal complaint under 49 U.S.C. 11701(b), only the I.C.C. has the power to determine whether the institute an investigation into the lawfulness of the surcharge. (Pet. 13-14). The I.C.C. is quibbling with words. But the petition for certiorari elsewhere recognizes, shippers have two statutory

means by which to challenge a surcharge. These are by petition, 49 U.S.C. 10705a(b)(3)(A), or by complaint under 49 U.S.C. 11701(b). (Pet. 4, 9).

The objectors to the surcharge filed with the agency their "Petition to Reject, Verified Complaint, Protest, and Petition for Suspension", which should satisfy any statutory terms. Moreover, the I.C.C. had not completed its "reasonably expected costs" proceeding so as to allow a "formal" complaint against the surcharge. Finally, the requirement for further agency proceedings concerning the surcharge is ancillary to the jurisdiction of the court of appeals over its abandonment remand order. Indeed, the I.C.C. recently consolidated an abandonment proceeding with a surcharge proceeding because of interrelated issues. Docket No. AB-43 (Sub-No. 92), *Illinois Central Gulf Railroad Company – Abandonment – in Alexander County, IL,* and Docket No. 38880, *Illinois Minerals Company, Et Al. – Petition for Cancellation of Surcharge.* (8/11/82).

The court of appeals had adequate power to remand the matter to the I.C.C. for findings under the Staggers Act as to the validity of the surcharge.

4. *Congressional oversight militates against grant of certiorari.* The Staggers Act provisions permitting unilateral surchages, both "commodity" and "light density branch line", are novel. Congress in section 217(b) of the Staggers Act, 94 Stat. 1924-25, provided that the I.C.C. shall before October 1, 1982 submit a report to the Congress concerning 49 U.S.C. 10705a:

> The Interstate Commerce Commission shall, within 2 years after the effective date of this Act, submit a report to the Congress with respect to whether the provisions of section 10705a of title

> 49, United States Code, has adequately addressed the joint rate problems of rail carriers. The report shall include such recommendations with respect to such joint rate problems as the Commission considers necessary and appropriate.

The I.C.C. on March 18, 1982, instituted Ex Parte No. 427, *Rail Carriers: Joint Rates Study-Report to Congress,* 47 Fed. Reg. 11787, and invited comments from the public. The I.C.C.'s report is imminent. A grant of certiorari would seem inappropriate in view of the Congressional attention which will be given this subject matter.

The experimental nature of the unilateral surcharge is further indicated by the 3 year expiration date for "commodity" surcharges under section 10705a(a). 49 U.S.C. 10705a(p)(1) provides:

> The authority to apply a surcharge under subsection (a) of this section, and (except as provided in paragraph (2) the authority to cancel such a surcharge, shall expire 3 years after the effective date of the Staggers Rail Act of 1980 unless extended for one additional year by the Commission upon petition of any rail carrier and for good cause shown.

The forthcoming mandatory report by the I.C.C. to the Congress with respect to all surcharges under 49 U.S.C. 10705a, together with the 3 year expiration date for com-

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[12]Over 85 comments were submitted. The only railroad making significant use of the light density line surcharge provisions is Illinois Central Gulf Railroad Company.

modity surcharges, suggests that the entire subject is not ripe for review by this Court.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1, 1982

[13]Section 217(c) of the Staggers Act requires the I.C.C. to include information concerning the application of surcharges and the cancellation of the application of joint rates by Consolidated Rail Corporation and other rail carriers during the preceding year under 49 U.S.C. 10705a. 94 Stat. 1925. See: *95th Annual Report of the Interstate Commerce Commission,* 33-36, 111 (1981).

INTERSTATE COMMERCE COMMISSION
DECISION
No. AB-43 (Sub-No. 47)

ILLINOIS CENTRAL GULF RAILROAD COMPANY ABANDONMENT BETWEEN MILEPOST 0.0. AT CHEROKEE, IOWA AND MILESPOST 96.47 AT SIOUX FALLS, SOUTH DAKOTA, IN CHEROKEE, O'BRIEN, SIOUX, AND LYON COUNTIES, IOWA, ROCK COUNTY, MINNESOTA, AND MINNEHAHA COUNTY, SOUTH DAKOTA

Decided: November 4, 1981

In *City of Cherokee* v. *ICC,* 641 F.2d 1220 (1981), the United States Court of Appeals for the Eighth Circuit set aside our earlier decision and remanded this case to the Commission. The United States Supreme Court recently denied petitions by the Commission and by Illinois Gulf Railroad for a writ of certiorari to the Eighth Circuit decision. *ICC* v. *City of Cherokee,* No. 81-350 and *Illinois Central Gulf Railroad* v. *City of Cherokee,* No. 80-2122, *cert. denied,* 50 U.S.L.W. 3278 (Oct. 13, 1981).

We are reopening the record in this proceeding in accordance with the Court of Appeals' decision. Applicant will have 30 days from the service date of this decision to file and serve any updated, revised evidenced in the form of verified statements, including evidence on the effect of any and all labor agreements upon cost evidence. Protestants may file and serve reply verified statements by January 12, 1981.

An oral hearing will be held at 9:30 a.m. on January 19, 1982, at the Cherokee Community Center, 530 West Bluff

Street, Cherokee, Iowa, for the primary purpose of cross-examination of witnesses who have submitted their direct evidence in the form of verified statements in advance of the oral hearing. Any direct testimony, other than applicant's rebuttal evidence, shall be received at the discretion of the hearing officer.

Administrative Law Judge William A. Shue has been assigned to preside at the oral hearing. The Judge should receive a courtesy copy of all pleadings filed by parties: Room 3331, Interstate Commerce Commission, Washington, D.C. 20423 (Telephone: 202-275-5031).

At the conclusion of the hearings the record will be certified to the entire Commission for decision.

It is ordered:

1. This proceeding is reopened for further consideration in accordance with the Court of Appeals' decision.

2. Applicant's verified statements must be filed within 30 days of the service date of this decision.

3. Protestants' reply verified statements, if any, must be filed by January 12, 1982.

4. Oral hearing will begin at 9:30 a.m. on January 19, 1982, at Cherokee, Iowa.

5. Each statement filed with the Commission shall be certified to show that a copy has been served on all parties of record.

By the Commission, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham, and Gilliam.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-163

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

CITY OF CHEROKEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-163

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

CITY OF CHEROKEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The Interstate Commerce Commission (ICC) seeks review of the decision of the court of appeals enjoining a railroad from imposing a freight surcharge under a provision of the Staggers Rail Act of 1980, 49 U.S.C. (Supp. IV) 10705a(b)(1)(A), after the Commission had declined to suspend the surcharge, and ordering the Commission to hold a hearing to determine whether the surcharge was lawful under the standards set forth in 49 U.S.C. (Supp. IV) 10705a(b)(2).[1]

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[1] 49 U.S.C. (Supp. IV) 10705a(b)(2) provides:

> A rail carrier may apply a surcharge under this subsection if, prior to the application of such surcharge, that portion of the charges applicable to traffic to and from the line to which the surcharge applies and accruing to the surcharging carrier does not provide such carrier revenues adequate to cover—

1. Illinois Central Gulf Railroad (ICG) operates a 96-mile branch line between Cherokee, Iowa, and Sioux Falls, South Dakota, which it has been attempting to abandon, pursuant to 49 U.S.C. (Supp. IV) 10903, since December 1977 (Pet. App. 2a). The ICC granted the railroad's application, but the Eighth Circuit vacated the order and remanded the matter to the ICC for further proceedings. *City of Cherokee* v. *ICC*, 641 F. 2d 1220, cert. denied, No. 80-2122 (Oct. 13, 1981).

Soon thereafter ICG filed a unilateral tariff surcharge, under 49 U.S.C. (Supp. IV) 10705a(b), for freight on the Cherokee-Sioux Falls line in excess of $1,000 per car, which was more than double the rate previously paid for freight moving on that line (Pet. App. 3a). Shippers immediately filed a protest with the ICC, requesting it to exercise its authority under 49 U.S.C. (Supp. IV) 10705a(g)(3) to reject or suspend the surcharge on the ground that the surcharge was merely an attempt to circumvent the remand order of the court of appeals on the abandonment issue (Pet. App. 3a). The ICC refused this request without explanation (Pet. App. 13a).[2]

2. The court of appeals accepted jurisdiction to review the ICG's unilateral surcharge and enjoined the railroad from implementing the new rate until the Commission conducted a hearing and determined whether the new rate was

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(A) 110 percent of such carrier's variable cost of transporting the traffic involved to or from such line; plus

(B) 100 percent of such carrier's reasonably expected costs of continuing to operate such line, which shall include all costs necessary is sustain service on the line.

[2]The shippers then moved the court of appeals for a stay of the rate pending judicial review, which the court granted (Pet. 6). Justice Blackmun denied ICG's motion for a stay of the court of appeals' action. *Illinois Central Gulf R.R.* v. *City of Cherokee*, No. A-45 (July 24, 1981).

lawful under 49 U.S.C. (Supp. IV) 10705a(b) (Pet. App. 1a-9a). The court based jurisdiction on the All Writs Act, 28 U.S.C. 1651(a),[3] finding that the ICG's action was "intended to interfere with our clear mandate and jurisdiction in the abandonment case" (Pet. App. 4a & n.2). The court concluded, however, that it would be unfair to ICG to forbid it to impose a valid surcharge under the Staggers Rail Act of 1980, even if ICG acted only to avoid the court's prior order. The court of appeals therefore ordered the Commission to conduct a hearing to determine as quickly as possible whether the $1,004 per car charge was consistent with 49 U.S.C. (Supp. IV) 10705a(a)(2)(B)(ii), 10705a(a)(3)(B), and 10705a(b)(3)(C).[4]

3. The Commission's primary claim (Pet. 7-13) is that the decision below conflicts with a line of cases from this Court forbidding courts of appeals to enjoin rates that the ICC has declined to suspend, because such action constitutes an unwarranted interference with the Commission's plenary authority to regulate rates. See, *e.g.*, *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 451 (1979); *United States* v. *SCRAP*, 412 U.S. 669, 690 (1973); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 672 (1963). See also *Consolidated Rail Corp.* v. *National Association of Recycling Industries, Inc.*, 449 U.S. 609, 619

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[3]The All Writs Act, 28 U.S.C. 1651(a), provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[4]Section 10705a allows the carrier to adopt surcharges that do not exceed 110% of the variable cost of carrying the traffic on the line and 100% of the reasonably expected cost of continuing the service (Pet. App. 7a). The court of appeals found that the ICC had not adopted a definition of "reasonably expected cost[s]" and therefore it was impossible to determine whether the charges imposed by ICG were proper (*ibid.*). The legality of the surcharge is not, however, an issue before this Court and remains to the examined on remand by the ICC.

(1981). The Commission also argues that reliance by the court of appeals on the All Writs Act to justify the injunction conflicts with the Fifth Circuit's decision in *Mississippi Public Service Commission* v. *ICC*, 662 F. 2d 314 (1981). See also cases cited at Pet. 10 n.10.

The United States has not joined the Commission's petition because, in our view, the decision rests on an unusual factual record that distinguishes this case from those cited by the Commission and limits the significance of the court of appeals' ruling. Since the situation is most unlikely to recur, the decision below does not appear to warrant review by this Court.

Crucial to the decision in this case is the uncontested finding of the court below that the railroad's action was a direct attempt to undermine the mandate of the court of appeals in the abandonment proceeding (Pet. App. 4a). The court of appeals' decision is thus not primarily an attempt to interfere with the ICC's plenary authority over rates, but is instead an effort to protect the integrity of the court's prior order. Indeed, the court of appeals expressly limited its decision to the situation where the carrier acts in apparent defiance of a prior court order. The court of appeals thus concluded that this Court's prior decisions did not compel judicial inaction in this unusual situation (Pet. App. 4a).[5]

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[5]The Fifth Circuits's decision in *Mississippi Public Service Commission* v. *ICC*, *supra*, is also inapposite. The court in that case recognized the possibility that the All Writs Act might provide a court with discretion to suspend a rate in a proper case, but held that an injunction was not warranted when all that had occurred was the imposition of a surcharge and a refusal by the ICC to suspend it. The absence of a prior court order clearly distinguishes that decision.

Although the ICC is correct (Pet. 12 n.12) in asserting that the All Writs Act extends to cases where an appeal is not pending, *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 603 (1966), it does not follow that the "considerations" in the *Mississippi Public Service Commission* case and this one "are the same" (Pet. 12 n.12). Merely because the Act might

Although we are not convinced that the court of appeals was correct in concluding that the All Writs Act allows a court to enjoin a rate, even when it is in derogation of a prior court order,[6] the issue is not controlled by prior decisions of this or any other court.

Moreover, the situation giving rise to this decision is most unlikely to be repeated. The prior decision vacating the abandonment order is fairly uncommon because of the limited scope of review that courts of appeals have in such matters.[7] Also, the size of the surcharge imposed by ICG is relatively high—larger than any cited by the Commission and much larger than most (Pet. 13 n.13)—and its timing is peculiarly suspect, as the court of appeals explained. A decision that is the product of such a confluence of unusual events does not appear to be worthy of review by this Court.

4. The Commission also asserts (Pet. 13) that the court of appeals erred in ordering it to investigate and determine the propriety of the surcharge. In the abstract, the order seems to trench significantly on the ICC's discretion to review carriers' rates, but viewed in context, the decision represents

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apply to both situations does not mean that the factors that inform the court's decision to issue an injunction are the same. Disregard of a prior court order obviously creates a stronger basis for judicial action. See note 6, *infra*.

[6]The All Writs Act has been used in other contexts to forbid attempts by litigants to circumvent prior court orders. See, *e.g.*, *Cole* v. *United States*, 657 F. 2d 107, 109 (7th Cir. 1981); *Clinton* v. *United States*, 297 F. 2d 899, 906 (9th Cir. 1961), cert. denied, 369 U.S. 856 (1962); *Bullock* v. *United States*, 265 F. 2d 683, 691 (6th Cir.), cert. denied, 360 U.S. 909 (1959). See also *United States* v. *New York Telephone Co.*, 434 U.S. 159, 174 (1977).

[7]In this regard, we note that the earlier remand of the abandonment order in no way precludes the ICC from ordering abandonment of this line. The ICC still has that issue under consideration. Obviously, if abandonment is granted, this case is of no prospective significance, either to the railroad or the shippers. That is another reason why interlocutory review by this Court is not warranted.

an equitable solution to a difficult problem created largely by ICG's ostensible refusal to abide by the remand order in the abandonment case. The court of appeals presumably could have exercised its equitable power to forbid ICG from imposing any surcharge at all. But the court limited the intrusive effect of its order by allowing the surcharge to go into effect, so long as it complied with the statutory standards in the Staggers Rail Act of 1980, 49 U.S.C. (Supp. IV) 10705a(b). In order to assure compliance with the Staggers Rail Act, however, the court was forced to rely upon the Commission's expertise. Given the court's decision that it had jurisdiction to entertain this case, its decision to remand the case for further proceedings is a reasonable one and would certainly not warrant review independent of the All Writs Act issue.

Respectfully submitted.

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